

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:98CR3056
)	
Plaintiff,)	
vs.)	MEMORANDUM
)	AND ORDER
SHON HOPWOOD,)	
)	
Defendant.)	

This matter is before the court on the defendant's notice of appeal (filing 66) and on the clerk's recent inquiry (filing 67) regarding such filing. The notice of appeal relates to the court's memorandum and order entered on May 9, 2005 (filing 65), denying the defendant's Rule 60(b)(5) motion (filing 64) for relief from the court's judgment entered on December 4, 2000 (filing 53), denying the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 44).

Before the defendant's appeal can proceed, a certificate of appealability must issue. See Fed. R. App. P. 22(b); United States v. Lambros, 404 F.3d 1034 (8th Cir. 2005) (a certificate of appealability is required to appeal the denial of a Rule 60(b) motion in a § 2255 proceeding). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should

issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Id.

For the various reasons set forth in the court’s previous memorandum and order (filing 65), the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Even though a certificate of appealability shall not issue, the appeal does appear to be taken in good faith, such that the defendant may continue to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a)(3).

Accordingly,

IT IS ORDERED:

1. That a certificate of appealability shall not issue in this case;
2. That, in response to the clerk’s inquiry, the defendant may proceed in forma pauperis on appeal; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

July 13, 2005.

BY THE COURT:

s/ Richard G. Kopf
United States District Judge